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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1186

GUSSIE JOFFE,

Petitioner,

v.

SIDNEY H. JOFFE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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March 1, 1968

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Gussie Joffe, petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on October 27, 1967.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 384 F.2d 632 and is reprinted in the Appendix hereto, p. A-1, *infra*. The unreported order of the United States District Court for the District of New Jersey, is reprinted in the Appendix hereto, p. A-4, *infra*, together with an explanatory letter from the District Judge to counsel for the respondent.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on October 27, 1967, and a timely petition for rehearing was denied on November 28, 1967. On February 19, 1968, Mr. Justice Brennan signed an order extending the time for filing this petition for certiorari to and including March 1, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal district court in New Jersey, in a diversity suit brought to enforce money judgments issued by a New York state court, should stay its proceedings until the New Jersey state courts have finally determined whether those judgments are entitled to recognition in those courts by virtue of the Full Faith and Credit Clause of the United States Constitution.

2. Whether a federal district court in New Jersey, in a diversity suit brought to enforce money judgments issued by a New York state court, is independently obligated to recognize and enforce those judgments, either as a matter of comity or by reason of the Full Faith and Credit Clause, where there has been full and fair litigation in the New York state court as to that court's jurisdiction over the parties and the subject matter of the suit leading to the entry of judgments in question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. IV, Sec. 1: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

United States Code, Title 28, § 1738: Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

This case is intimately related to the prolonged and complex marital controversy between the petitioner wife and the respondent husband, a controversy that has deeply involved the judiciary of both New York and New Jersey. The scope of that controversy and the full faith and credit implications thereof are set forth at some length in the companion petition for certiorari filed this day by the petitioner herein, seeking review of certain contempt orders issued by the New Jersey court, and need not be repeated here. *Joffe v. Joffe*, 50 N.J. 265, 234 A.2d 232.

Suffice it to say that the instant federal court controversy commenced on February 5, 1964, when the wife filed a complaint in the District Court for the District of New Jersey. That complaint, grounded on diversity of citizenship and alleging that more than $10,000 was in controversy, sought judgment against the husband in the amount of $18,856.

The claim was grounded on two judgments that had been duly entered by the New York Supreme Court for alimony and support arrearages owed by the husband under decrees previously entered by that court. The first judgment, entered on Sept. 25, 1963, was in the amount of $10,660; the second judgment, filed on Dec. 2, 1963, was in the amount of $8,196. These two judgments, of course, were among those that were later to be denied full faith and credit by the New Jersey courts; and they were among those that the New Jersey Superior Court ordered her to vacate in its contempt ruling.

On February 26, 1964, the petitioner wife filed an amended complaint. This complaint not only repeated the demand for the $18,856 due under the New York judgments but also prayed for a judgment that the New York decrees in question must be given full faith and credit. Simultaneously with the filing of this amended complaint, the wife filed a motion in the District Court seeking to restrain the husband from proceeding further in the New Jersey courts on the ground that the New York orders and judgments were entitled to full faith and credit.

This motion to restrain the husband from proceeding further in New Jersey was amended in several respects from time to time as the New Jersey proceedings continued to go forward. The petitioner wife also sought leave to file a further amended complaint for a declaratory judgment as to the validity of the New York decrees. And she further moved for summary judgment to recover the $18,856 sought in the original complaint.

Following a hearing on these motions of the wife and counter-motions of the husband, the District Judge in open court on November 16, 1966, denied all of the wife's motions and ordered dismissal of the complaint as amended on February 26, 1964. But as explained in a letter to the husband's counsel, see Appendix p. A-5, *infra,* the District Judge changed his mind about dismissing the complaint; upon reflection, he decided to adhere to the denial of all the mo-

tions filed by the wife but to stay all proceedings "until the litigation presently pending in the state courts between the same parties, involving the full faith and credit issue, is finally decided."

Accordingly, on November 29, 1966, the District Judge signed an order (1) denying all relief sought by the wife in her various motions, and (2) staying all further proceedings in the District Court "until there be a final determination by the courts of the State of New Jersey, in the litigation there pending between the parties to this action, on the question of whether or not the judgments obtained by plaintiff [wife] against defendant [husband] in the State of New York are entitled to full faith and credit in New Jersey." See Appendix hereto, p. A-5, *infra*.

On appeal, the Third Circuit stated that this action denying the motions and staying further proceedings in the federal court "was entirely proper." The Third Circuit further noted that subsequent to the District Court's action, the New Jersey Supreme Court had rendered its decision affirming "the Superior Court decision denying full faith and credit to the New York proceedings here involved." Several paragraphs were quoted by the Third Circuit from the opinion of the New Jersey Appellate Division as adopted by the New Jersey Supreme Court. See *Joffe v. Joffe*, 50 N.J. 265, 234 A.2d 232 (the subject of the petition for certiorari in the case companion hereto). The District Court's judgment was thus affirmed.

REASONS FOR GRANTING THE WRIT

The Third Circuit's approval of a stay of federal court proceedings pending a state court determination under the Full Faith and Credit Clause of the United States Constitution raises novel and significant questions deserving consideration by this Court.

This is a diversity action in a federal court in New Jersey to recover on two money judgments entered by a New York

state court. Basically at issue is the question whether, in such a case, the federal court has an independent obligation to decide the degree of faith and credit to be accorded those New York judgments in the federal court. Or should the federal court stay its hand until the New Jersey state courts have finally ruled upon whether they are obliged under the Full Faith and Credit Clause to give effect to those New York decrees?

It seems plain enough that the faith and credit to be accorded a foreign state court judgment in a federal court or in a state court is either a matter of federal comity or a federal question arising under the Constitution. It is a matter to be decided independently of any state law or state court decision. See Moore's Federal Practice, Vol. 1A, sec. 0.311[2], pp. 3412-3413 (1965). This Court implied as much in *First National Bank v. United Air Lines*, 342 U.S. 396 and in *Sutton v. Leib*, 342 U.S. 402. This case affords an opportunity for this Court to make express what has always been assumed to be true.

If that be the rule, the more general proposition recently enunciated in *Zwickler v. Koota*, 389 U.S. 241, 248, would come into operation:

> "... Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '... to guard, enforce, and protect every right granted or secured by the Constitution of the United States ...' *Robb v. Connolly*, 111 U.S. 624, 637. 'We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.' *Stapleton v. Mitchell*, 60

F. Supp. 51, 55; see *McNeese v. Board of Education*, 373 U.S. at 674, n. 6."

And while the Court in *Zwickler* was dealing with the enforcement of a First Amendment right in a federal court, there appears to be no conceptual or constitutional reason for treating differently a claim asserted in a federal court in terms of federal comity or in terms of the Full Faith and Credit Clause of Article IV of the Constitution.[1]

In abdicating their function to make an independent determination as to the full faith and credit claim, the federal courts below appear to have been misled by the diversity nature of this lawsuit.[2] Normally, the rule of decision as to most matters in issue would be governed by the local New Jersey law, pursuant to the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64. And the whole premise of the stay of federal court proceedings here was to await and presumably to be bound by the New Jersey court determination as to the validity of the New York decrees in New Jersey.

But it is constitutionally incongruous to say that the *Erie* rule was ever designed to compel federal courts to follow local rulings as to the impact of a federal constitutional provision when an identical federal question happens to arise in the context of a diversity case. The duty to give full faith and credit to the actions of the court of another state is not

---

[1] See *Southard v. Southard*, 305 F.2d 730 (C.A. 2), holding that a federal court has jurisdiction under the Declaratory Judgments Act to adjudicate the validity of a Connecticut divorce decree on the allegation that Connecticut had failed to give constitutional full faith and credit to a prior Nevada divorce decree.

[2] Cf. *Liberty Mutual Ins. Co. v. Pennsylvania R. Co.*, 322 F.2d 963, 968 (C.A. 7), where the court ruled that a federal district court "is without authority to abdicate its admitted diversity jurisdiction by dismissing the action solely on the ground that other litigation is pending in a state court involving substantially the same parties and subject matter in order to obtain complete justice and avoid multiple litigation." See also *Kline v. Burke Const. Co.*, 260 U.S. 226.

an obligation confined to state courts; nor are the state courts the final arbiter under the Full Faith and Credit Clause. The duty falls as well upon federal courts, as Congress has recognized in 28 U.S.C. § 1738, whether viewed as a matter of comity or of constitutional compulsion. And this Court on occasion has indicated as much. See, e.g., *Davis v. Davis*, 305 U.S. 32 (federal courts in the District of Columbia held obliged to give full faith and credit to a Virginia decree).

Thus, the Third Circuit has here created a most confusing precedent. It has approved deferral of consideration of the full faith and credit claim until the New Jersey courts have finally ruled on that federal issue, thus implying that the New Jersey ruling might become binding on the federal court.[3] Such a ruling places the petitioner in an impossible position. If the New Jersey ruling is incorrect and if this Court were to decline to review and reverse that ruling, the petitioner would be saddled with an incorrect application of the Full Faith and Credit Clause without any opportunity to secure an independent federal court determination of her federal claim. On the other hand, if the New Jersey ruling were eventually to be ignored by the federal district court, or even if it be corrected on review by this Court, the petitioner in the meantime has been denied the right to a prompt exercise of the federal court's independent obligation to adjudicate her federal claim with respect to money judgments affecting the support due her and her minor child.

The obvious importance of the ruling below, in terms both of the duty of federal courts to respect the rulings of state courts and of the day-to-day execution of federal diversity jurisdiction, bespeaks the need for review by this Court.

---

[3]The New Jersey ruling, of course, is subject to review by this Court, as requested in the companion petition for certiorari.

CONCLUSION

For these reasons, the judgment below should be reviewed on writ of certiorari.

Respectfully submitted,

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006
Counsel for Petitioner

March 1, 1968

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Gussie JOFFE, Appellant,

v.

Sidney H. JOFFE.

Nos. 16264, 16412.

Argued Sept. 29, 1967.

Decided Oct. 27, 1967.

Gussie Kleinman (Joffe), pro se.

J. Mortimer Rubenstein, Rubenstein & Albert, Paterson, N. J., for appellee.

Before McLAUGHLIN, HASTIE and FORMAN, Circuit Judges.

OPINION OF THE COURT

PER CURIAM.

In this branch of a bitter domestic litigation, plaintiff-appellant seeks to recover on two money judgments obtained by her in the New York State courts. By motion, later amended, she asked that defendant-appellee be enjoined from further proceeding against her in his then pending action in the New Jersey courts until after determination by the district court of the said New York judgments issue. As the district court found, the New Jersey litigation involved, inter alia, the problem of whether the New York judgments should be accorded full faith and credit in New Jersey. At the time the court acted on the motion it further appeared that the New Jersey Supreme Court had accepted the New

Jersey Superior Court decision for consideration and that said Court might decide whether appellant's New York proceedings and judgments in her favor were entitled to acceptance by New Jersey.

The district court denied plaintiff's motion as amended and ordered all proceedings in that suit stayed until after final determination by the courts of the State of New Jersey in the above mentioned litigation, of the question whether the judgments obtained by appellant against appellee in the state of New York are entitled to full faith and credit in New Jersey.

On the plain situation before us, we are satisfied that the district court order denying plaintiff-appellant's amended motion and ordering all proceedings in the district court action stayed as stated was entirely proper. It should be noted that the New Jersey Supreme Court by its per curiam decision of October 9, 1967, 234 A.2d 232, in the State court appeal referred to has now affirmed the Superior Court decision denying full faith and credit to the New York proceedings here involved. That Court quoted with approval the opinion of the New Jersey Superior Court, Appellate Division in said case which held as follows:

> "There is nothing in the record to establish that at the time the Chancery Division action was commenced the New York court had personal jurisdiction over the plaintiff or the marital *res*. It is further apparent that all New York judgments were obtained by defendant in violation of the Chancery Division restraining orders.
>
> "By proceeding in the New York court after having been served with the restraining orders of our court, defendant was guilty of contempt. The judgment of the Chancery Division adjudging defendant in contempt of court is affirmed."

The New Jersey Supreme Court in its said per curiam opinion ruled as follows:

"The judgment is affirmed for the reasons expressed in the opinion of the Appellate Division, supra."

The judgment of the District Court will be affirmed with costs to be taxed against plaintiff-appellant.

JUDGMENT
OF THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
(Dated October 27, 1967)

[Caption Omitted]

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the District Court, filed October 28, 1966 and November 29, 1966, be, and the same are hereby affirmed, with costs taxed against plaintiff-appellant.

ATTEST:

Clerk

ORDER
OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(Dated November 29, 1966)

[Caption omitted]

This matter coming on to be heard on November 14, 1966, the return day of plaintiff's motion filed herein on October 25, 1966, and plaintiff's amended motion filed herein on November 1, 1966, in the presence of plaintiff, appearing pro se, and J. Mortimer Rubenstein, appearing for defendant; and the Court after having read the briefs and affidavits filed on behalf of the parties, and after having heard and considered the arguments of counsel, being of opinion that plaintiff is not entitled to any of the relief sought by her motion and amended motion whereby she seeks, inter alia, to enjoin defendant from further proceeding against her in any of the courts of the State of New Jersey with respect to any matter involving the marital rights and obligations of the parties, pending a determination by this Court as to whether full faith and credit should be accorded in New Jersey to certain judgments obtained in the State of New York by plaintiff against defendant, which litigation in New York also involved the marital rights and obligations of the parties to this action; and it appearing from the record herein that the litigation presently pending in the Superior Court of the State of New Jersey was commenced by defendant herein prior to the institution of the action in this Court by plaintiff and involved the issue of full faith and credit; and it further appearing as a result of the certification granted by the Supreme Court of New Jersey on May 31, 1966 (47 N.J. 420), that said Court may decide the question of whether or not the New York proceedings and judgments based thereon are entitled to full faith and credit in New Jersey, and that until such determination is made this Court should stay all further proceedings in the action here pending; it is, on this 29th day of November, 1966,

ORDERED, that the relief sought by plaintiff in her motion filed herein on October 25, 1966 and November 1, 1966, respectively, be, and the same hereby is, in all respects denied; and it is further

ORDERED, that until there be a final determination by the courts of the State of New Jersey, in the litigation there pending between the parties to this action, on the question of whether or not the judgments obtained by plaintiff against defendant in the State of New York are entitled to full faith and credit in New Jersey, all further proceedings in this action in this Court be stayed.

Anthony T. Augelli
United States District Judge

† † †

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Newark, N. J. 07101

Chambers of
ANTHONY T. AUGELLI
Judge

November 29, 1966

J. Mortimer Rubenstein, Esquire
Rubenstein & Albert, Esquires
45 Church Street
Paterson, New Jersey 07505

Re: Joffe v. Joffe
Civil Action No. 105-64

Dear Mr. Rubenstein:

This will acknowledge receipt of your letter of November 16, 1966, with which you enclosed form of proposed order to be entered in this case following the disposition made by me of plaintiff's motion and amended motion on November 14.

I adhere to the denial of all relief sought by plaintiff in her motions, but do not feel that I should, at this time, dismiss plaintiff's complaint and amended complaint for failure to state a claim upon which relief may be granted. Upon reflection, and in fairness to Mrs. Joffe, I think that all proceedings in the case in this Court should be stayed until the litigation presently pending in the state courts between the same parties, involving the full faith and credit issue, is finally decided.

I have changed the form of order submitted to conform to my present thinking and enclose a copy for your files. The original order has this day been filed with the Clerk of the Court. A copy of this letter, as well as a copy of the order, has been sent to Mrs. Joffe.

Yours very truly,

Anthony T. Augelli

ATA:fho

c.c. Mrs. Gussie Joffe;
Clerk of the Court.

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v.

SIDNEY H. JOFFE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

The respondent, Sidney H. Joffe, desires to file the following Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioner in the above matter.

Counter-Statement of the Case

Sidney H. Joffe was born in Paterson, New Jersey and has lived in New Jersey all of his 58 years of life. By profession he is a doctor and since the time he was licensed

to practice medicine, he has practiced medicine in the State of New Jersey solely, basically in the City of Paterson, as a partner together with his twin brother, Philip Joffe, until the death of his brother, and thereafter still continues in such practice alone. On occasions he maintained an office in his home located in neighboring communities and always in the State of New Jersey and never practiced medicine in any other State. At no time in his life has he ever domiciled in or resided in any other State than the State of New Jersey.

The parties were married on January 15, 1955 at Glen Rock, New Jersey. At the time of said ceremony, Sidney H. Joffe, was residing at 155 Rock Road, Glen Rock, New Jersey in a one family home owned by him. After the marriage, the petitioner, Gussie Joffe, came to live with the respondent, Sidney H. Joffe at his home at 155 Rock Road, Glen Rock, New Jersey. Subsequently, three children of a previous marriage of the respondent came to live with the parties at 155 Rock Road, Glen Rock, New Jersey. A child was born of this marriage and this child was born in the State of New Jersey, and also came to live at 155 Rock Road, Glen Rock, New Jersey.

They continued to live at 155 Rock Road, Glen Rock, New Jersey until November 1959 at which time the parties purchased, as tenants by the entirety, a one family house in Montclair, New Jersey. The parties, together with the three children of the previous marriage and the one child of this marriage, lived at the Montclair, New Jersey residence. He continued his practice in Paterson, New Jersey, continued his association with the hospital in Paterson, New Jersey, continued his Temple association in the State of New Jersey and at no time was he a member of any other religious Temple other than the one in New Jersey.

On May 1, 1962, the parties separated and the despondent moved to an apartment at Paterson, New Jersey. He

requested that the petitioner and the infant child of this marriage to live with him but she refused to do so and remained with the infant child at the Montclair, New Jersey residence. Thereafter, the petitioner moved almost all of the furniture out of the Montclair, New Jersey home against the wishes of the respondent without his knowledge and removed the child from the home in Montclair, New Jersey to an apartment in New York City, New York.

On June 21, 1962, the petitioner, Gussie Joffe, instituted an action for separation in the Supreme Court of New York, Index No. 30789-62. In her Complaint she alleged that she was a resident of the State of New York. Simultaneously with the institution of her suit for separation, she filed Affidavits seeking a Writ of Sequestration. In her Affidavits she stated that she was seeking the Writ of Sequestration since the defendant, in the New York action, the respondent in this action, Sidney H. Joffe, could not be served with process in the State of New York and that no provision for judgment, either interlocutory or final, could be made for the support of the petitioner and child unless the Order of Sequestration was granted. This was based upon the fact that Sidney H. Joffe was not domiciled in the State of New York since had he been so domiciled the long arm statute of New York would have applied and based upon said Affidavit a Writ of Sequestration issued and certain assets of the respondent, Sidney H. Joffe, in the State of New York were seized.

On July 13, 1962, an Order to Show Cause was issued in said New York action requiring the respondent herein to show cause why an Order should not be made granting temporary custody of the infant child to the petitioner herein, granting alimony and support for said infant child, *pendente lite,* requiring him to maintain the home in Montclair, New Jersey, and other relief. On July 13, 1962, a

copy of said Order to Show Cause, Affidavits and exhibits attached thereto, were served upon the respondent herein at his home, 759–11th Avenue, Paterson, New Jersey. He retained an attorney in the State of New York for the sole purpose of attacking the jurisdiction of the action instituted in the New York court by way of special appearance in accordanee with the rules of New York and not to enter a general appearance. The said attorney, in accordance with the rules of New York courts then in effect, filed a Notice of Motion by way of special appearance attacking the jurisdiction of the New York court, on the grounds that Gussie Joffe, the plaintiff in such action, was not a resident of the State of New York. Such Notice of Motion was filed on August 14, 1962.

On August 16, 1962, the respondent herein, Sidney H. Joffe, filed a Complaint in the Superior Court of New Jersey, Chancery Division, seeking in the First Count custody of the infant child and seeking in the Second Count an accounting for furniture removed by the petitioner in this cause. The Summons and Complaint were served upon the said Gussie Joffe personally in the State of New Jersey by the Sheriff of the County of Passaic and State of New Jersey in accordance with the rules of the New Jersey courts. On August 27, 1962, Sidney H. Joffe filed a verified Petition in said New Jersey action seeking an Order of injunction against the said Gussie Joffe. Based upon said Petition, an Order to Show Cause with restraints issued on August 27, 1962. A day or two before the time for answer to expire, at the request of the attorney for Gussie Joffe, attorney for Sidney H. Joffe in the New Jersey action signed a Stipulation extending time to file an Answer.

In the meantime, on September 12, 1962, Judge Klein of the New York Supreme Court rendered an opinion on

the Notice of Motion to strike the Complaint brought by Sidney H. Joffe in the New York action by way of special appearance. His decision held that Gussie Joffe's Affidavit established a *prima facie* residence on her behalf in the State of New York and that such *prima facie* proof coupled with a levy made on the defendant's assets in the State of New York were sufficient to give the New York court jurisdiction for the purpose of denying the motion. No finding was made by Judge Klein either that Sidney H. Joffe was domiciled in the State of New Jersey or that he was personally subject to the jurisdiction of that court. The decision gave Sidney H. Joffe the right to file an Answer to the Order to Show Cause and the Complaint. Sidney H. Joffe neither filed any such Answer nor Affidavits and did not thereafter, in any way, participate in the proceedings.

On September 20, 1962, Gussie Joffe, defendant in the New Jersey action, filed with the New Jersey Superior Court, in the case then pending, a verified Petition to strike the Complaint of Sidney H. Joffe in such New Jersey action on the grounds that the New Jersey court did not have jurisdiction. Based upon said Petition, an Order to Show Cause issued September 20, 1962 and returnable October 5, 1962 which Order to Show Cause restrained Sidney H. Joffe from proceeding with his cause of action and from proceeding upon the Order to Show Cause issued by the court dated August 27, 1962, and until the further order of the court. On September 21, 1962, the Honorable Vito A. Concilio, Judge of the Superior Court, entered an Order in said New Jersey action restraining Gussie Joffe from proceeding in any manner with her cause of action instituted by her in the State of New York, until the further order of the court and determination of the motions. A copy of said Order for temporary restraint was served upon Gussie Joffe personally. Said latter Order of Re-

straint has never been vacated by the court and still remains in full force and effect.

Sidney H. Joffe filed an Answering Affidavit on October 3, 1962 in answer to the verified Petition of Gussie Joffe to strike the New Jersey Complaint. Said motion to dismiss filed by the said Gussie Joffe in the New Jersey court was argued and the court ordered the matter continued until November 2, 1962. An Order of Continuance to that effect was entered by the court which continued the restraints contained in the Order to Show Cause of September 20, 1962 obtained by Gussie Joffe and the Order of Restraint contained in the court's Order of September 21, 1962 obtained by Sidney H. Joffe and provided that Sidney H. Joffe be given leave to file an Amendment to the Complaint adding a Third Count seeking to permanently enjoin the said Gussie Joffe from proceeding in the State of New York.

Thereafter, the said return day of Orders to Show Cause and Notice of Motion were adjourned at the request of the said Gussie Joffe and the matter was set down for the taking of oral testimony upon the motion filed by the said Gussie Joffe on January 16, 1963. All restraints were continued and an Order permitting the said Sidney H. Joffe to have visitation with the infant child who is in the physical possession of Gussie Joffe, was entered.

On or about December 24, 1962, Gussie Joffe, in violation of the restraints imposed upon her in the New Jersey action, filed a Notice of Motion in the New York action seeking to have a declaration made that Sidney H. Joffe had appeared generally in said New York action. The Notice of Motion was returnable January 8, 1963. Sidney H. Joffe filed a verified Petition in the New Jersey action seeking to hold the said Gussie Joffe in contempt based upon the above facts on January 4, 1963. An Order to

Show Cause issued on said verified Petition and contained restraints restraining her from proceeding in the New York action and requiring her to vacate any Orders which she might obtain. No application was made to dissolve the restraints despite permission contained in the Order to Show Cause to do so and despite the restraints issued, Gussie Joffe proceeded to have an Order entered in the New York court declaring that Sidney H. Joffe had appeared generally in the New York action. The said Sidney H. Joffe made no appearance, either personally or through attorney on said motion in the New York court nor did he participate therein in any manner.

The said Gussie Joffe then filed a Supplementary Affidavit to her Petition to dismiss the Complaint in the New Jersey court and alleged as additional grounds the Order of Judge Backer in the New York court entered on January 11, 1963 declaring that Sidney H. Joffe had entered a general appearance in New York as an additional reason why the courts of New Jersey did not have jurisdiction. The matter of taking of testimony on the Petition to strike the New Jersey Complaint was partially heard and continued to an additional date. The said Gussie Joffe, through her attorneys in the New Jersey action, delayed the taking of such additional testimony by repeated requests for adjournments. In the meantime she continued to move her cause of action in the State of New York despite the restraints imposed upon her by the courts of New Jersey in the suit in which she had been served personally. Each time she served a paper on Sidney H. Joffe of her planned move in New York, applications were made in the New Jersey Superior Court to restrain her and hold her in contempt for violating the Orders of the New Jersey Superior Court. Each time the restraints were granted and the applications to hold her in contempt were carried until disposition of her Petition to strike Sidney

H. Joffe's Complaint in the New Jersey Superior Court. Included among such actions taken by her, was to obtain judgment for arrearages on the *pendente lite* order of the New York Supreme Court.

The continued date of taking of testimony in the New Jersey Superior Court on Gussie Joffe's Amended Petition to strike the Complaint filed by Sidney H. Joffe in such court was held on November 15, 1963. The said Gussie Joffe was represented by counsel at such hearings and porticipated fully in said hearings. Testimony not being completed on that date, the matter was continued to December 19, 1963 to take further testimony.

During that interval, Gussie Joffe again proceeded with her New York action contrary to the restraints. She caused to be served a Notice for settlement of proposed findings of fact, conclusions of law and judgment of separation. Once again Sidney H. Joffe filed a Petition in the New Jersey Superior Court seeking to restrain her from proceeding in the New York court and to hold her in contempt. An Order to Show Cause issued on his application which contained restraints restraining her from proceeding. Despite the restraints imposed upon her, Gussie Joffe proceeded and obtained a judgment for separation in the Supreme Court of the State of New York on December 2, 1963. Sidney H. Joffe did not participiate in any manner, either personally or through counsel, in such New York proceedings.

Immediately upon obtaining the judgment for separation in the New York Supreme Court, Gussie Joffe moved in the New Jersey Superior Court to declare that the judgment for separation obtained in the New York Supreme Court was entitled to full faith and credit in New Jersey as a valid *in personam* judgment against Sidney H. Joffe and amended her Petition to strike the plaintiff's Complaint based upon said additional grounds.

On December 19, 1963 the testimony on her petition to strike the New Jersey Complaint, including her allegations concerning the Order of Judge Backer declaring that Sidney H. Joffe had entered a general appearance in the State of New York and her allegation that the Judgment of separation obtained in the State of New York was entitled to full faith and credit in New Jersey as a valid *in personam* judgment against Sidney H. Joffe. Gussie Joffe appeared through counsel and participated fully in said hearing. At the conclusion of the testimony, the trial Judge requested Gussie Joffe to submit an exemplified copy of the New York Supreme Court proceeding. Her counsel said that she would do so immediately and the trial Judge reserved decision pending the submission of such record.

During the interval and while the trial Judge in the New Jersey Superior Court was awaiting the submission of the record as requested, Gussie Joffe commenced the instant action in the United State District Court for the District of New Jersey on February 4, 1964 seeking a money judgment against Sidney H. Joffe based on the judgments for arrearages obtained by her in the New York Supreme Court. On February 25, 1964 she filed an Amended Complaint adding a Second Count seeking a declaration that the Judgment of separation obtained by her was entitled to full faith and credit as an *in personam* judgment against Sidney H. Joffe. Based upon her Complaint, an Order to Show Cause was issued by Judge Augelli directing that Sidney H. Joffe show cause why he should not be restrained from proceeding in the New Jersey courts until the United States District Court for the District of New Jersey should determine whether the Judgment obtained by her in the New York Supreme Court was entitled to full faith and credit. Said Order to Show Cause contained an *ad interim* restraint against the defendant, Sidney H. Joffe, from proceeding in the New Jersey Superior Court.

Sidney H. Joffe, through his attorneys, moved to dismiss the Complaint filed by Gussie Joffe in the United States District Court or in the alternative, to stay proceedings in the United States District Court for the District of New Jersey until determination of the suit pending in the State of New Jersey. Sidney H. Joffe filed an Affidavit in answer to the Order to Show Cause obtained by Gussie Joffe.

On March 9, 1964, the Honorable Anthony T. Augelli, Judge of the United States District Court for the District of New Jersey, granted the application of Sidney H. Joffe to vacate and dismiss the restraints obtained by Gussie Joffe and denied her application for temporary injunction restraining the said Sidney H. Joffe from proceeding in the Superior Court of New Jersey. An Order to such effect was entered by the Honorable Anthony T. Augelli on May 18, 1964.

At the call of the motion brought by Sidney H. Joffe in the United States District Court for the District of New Jersey, it was agreed that a Consent Order would be submitted staying all proceedings pending in the United States District Court for the District of New Jersey, pending decisions and determinations of proceedings that were appealed therefrom in the suit in the New Jersey Superior Court, Chancery Division, under Docket No. M-6660-61. An Order to such effect was entered on May 18th, 1964.

On August 24, 1964 the Hon. Vito A. Concilio of the New Jersey Superior Court rendered his decision upon the Amended Petition filed by Gussie Joffe to strike the Complaint filed by Sidney H. Joffe. He found from the evidence adduced and produced that Sidney H. Joffe was and had been domiciled in the State of New Jersey, that the infant child was and had been domiciled in the State of New Jersey all of his life until removed to the State of New York

by Gussie Joffe without the permission of Sidney H. Joffe, that as a matter of fact Sidney H. Joffe had not entered a general appearance in the State of New York and had not litigated the issues in the State of New York; and that the various Orders and Judgments of the New York Supreme Court that Sidney H. Joffe was domiciled therein or had entered a general appearance were not entitled to full faith and credit in New Jersey nor was the Judgment of Separation obtained by Gussie Joffe entitled to full faith and credit in New Jersey as in personam judgment against Sidney H. Joffe. An Order to such effect was entered on September 8, 1964. Said Order remains in full force and effect today. Said Order of September 8, 1964 above referred to in the New Jersey Superior Court referred all outstanding contempt applications and Motions to the Hon. David A. Nimmo, Judge of the Superior Court of New Jersey, for appropriate action. One additional application for contempt was referred to the Hon. Vincent C. Duffy sitting in the New Jersey Superior Court for action.

A hearing was held on the contempt application before the Hon. Vincent C. Duffy in which Gussie Joffe participated through counsel. An Order of Contempt was entered by the Hon. Vincent C. Duffy in the New Jersey Superior Court on October 20, 1964. Said Order of Contempt punished the said Gussie Joffe and contained, among other things, an Order requiring Gussie Joffe to vacate the Orders and Judgments obtained by her in the New York action.

A hearing was held on the contempt applications referred to the Hon. David A. Nimmo in the New Jersey Superior Court in which Gussie Joffe participated through counsel. An Order of Contempt was entered by the Hon. David A. Nimmo on November 12, 1964. Said Order of Contempt required, among other things, that Gussie Joffe vacate the Orders and Judgments obtained by her in the New York action.

Gussie Joffe appealed from said Orders of Contempt to the New Jersey Superior Court, Appellate Division, which affirmed the Orders. She then Petitioned the Supreme Court of the State of New Jersey for Certification and Certification was granted. Thereafter the matter was appealed to the Supreme Court of the State of New Jersey and was affirmed by the Supreme Court of the State of New Jersey.

After the entry of the Order by the Hon. Vito A. Concilio on September 9, 1964, Gussie Joffe filed her Answer in the New Jersey action. Hearings, after numerous delays because of requests for adjournment and change of counsel by Gussie Joffe, were held over approximately 12 days and the parties are awaiting decision in said matter.

In the interim Sidney H. Joffe instituted an action for divorce in the New Jersey Superior Court, Chancery Division, under Docket No. M-695-63 against Gussie Joffe. Gussie Joffe was served personally in the State of New York. She entered no appearance nor filed any Answer. A Judgment *Nisi* of Divorce was granted Sidney H. Joffe on September 27, 1966 which Judgment became final on December 27, 1966. No appeal was taken from said Judgment and it remains in full force and effect.

On October 26, 1966 Gussie Joffe filed a Motion in the United States District Court for the District of New Jersey to restrain the defendant, Sidney H. Joffe, from proceeding in the New Jersey Courts, for leave to file a further Amended Complaint, for Summary Judgment on Count One of her original Complaint and Count Two of her Amended Complaint, and sought a temporary restraining Order ex parte. On October 20, 1966 the Hon. Vincent T. Augelli denied her application for temporary restraining Order ex parte and said Gussie Joffe filed a Notice of Appeal therefrom to the United States Court of Appeals.

On November 2, 1966 Gussie Joffe filed an Amended Motion in the said United States District Court seeking to restrain Sidney H. Joffe from proceeding in the New Jersey Superior Court and for Summary Judgment as to Count One of her original Complaint and for leave to file an Amendment to her Complaint. Sidney H. Joffe filed his Answering Affidavit at length. On November 16, 1966 the Hon. Vincent T. Augelli ordered that the Motion of the said Gussie Joffe be denied and ordered her Complaint dismissed. Subsequently and without further argument, the Hon. Vincent T. Augelli revised his decision to be a denial of the Motion of Gussie Joffe for restraint and for Summary Judgment and Amendment and staying all further proceedings until final determination of the proceedings in the New Jersey courts. Gussie Joffe appealed from said Order to the United States Court of Appeals.

Both Orders of the Hon. Vincent T. Augelli were affirmed by the United States Court of Appeals.

Reasons for Denial of Writ

The Respondent urges that the Petition for Writ of Certorari in this matter be denied since the decisions of the Courts below are in accordance with the well established rules and procedures of the Federal Courts, and raises no new or novel questions of such importance as to warrant the granting of a Writ of Certiorari. The primary basis of our contention are the cases which hold that a Federal District Court sitting in a State in a case based upon diversity of citizenship cannot enforce rights created in another State they would not be enforced in the State in which it sits. A Federal Court sitting in a case involving diversity of citizenship enforces the State law and policy of the State in which it sits. *Angel* v. *Bullington,* 330 U. S. 183 (1946); *Erie Railroad* v. *Tomkins,* 304 U. S. 64 (1938); *Klaxon* v.

Stentor Electric Manufacturing Co., 313 U. S. 487 (1941); *Griffin* v. *McCoach*, 313 U. S. 498 (1941). The State of New Jersey has declared that the New York actions are not entitled to full faith and credit which declaration remains in full force and effect. This is based upon the Federal decisions that hold that a decree based upon a finding of domicile is entitled to full faith and credit only if it is made after an actual contest and litigation of that issue or if in fact the domicile actually exists, *Davis* v. *Davis*, 305 U. S. 32 (1938); *Sherrer* v. *Sherrer*, 334 U. S. 343; *Coe* v. *Coe*, 334 U. S. 378. But neither the Federal Courts nor the State Courts can be foreclosed from examining and making full inquiry into the basis of the claim of jurisdiction upon which a foreign judgment is predicated, whether it be by inquiry as to the actual domicile of the plaintiff, fraud of the plaintiff, or jurisdiction over the defendant personally. The mere statement of or technicalities of the pleading are not the determining factor. The determining factor is whether there actually was jurisdiction over the defendant or whether there actually was domicile in the foreign jurisdiction. Both the Federal Courts in each State may make such inquiry. *Williams* v. *State of North Carolina*, 325 U. S. 226; *Adam* v. *Senger*, 303 U. S. 59; *Shulman* v. *Miller*, 191 F. Sup. 418 (E. D. Wisc. 1961); *Bigelow* v. *Old Dominion Copper Mining and Smelting Co.*, 225 U. S. 111 (1912); *Berkman* v. *Ann Lewis Shops*, 246 F. Sec. 44 (Sec. Cir. 1957); *Sherman* v. *Kirshman*, 369 F. Sec. 886 (Sec. Cir. 1966); *Lea* v. *Lea*, 18 N. J. 1 (Sup. Ct. 1955).

In addition thereto the question was fully litigated in the New Jersey Courts in which both parties participated both personally and through counsel. Where in two successive actions between the parties inconsistent Judgments are rendered, the Judgment of the second action is controlling in a third action between the parties. Restatement of

Judgments, Section 42 (1942); *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939); *American Surety Company* v. *Baldwin*, 287 U. S. 156 (1932). Whether they were entitled to full faith and credit was litigated at length with both parties being present in the New Jersey Superior Court and its Judgment is controlling.

As further reason for the denial of the Petition for Writ of Certification we urge that the action of the United States District Court was in conformance with the law which the Federal Courts have held that equity will always intervene to prevent a multiplicity of suits and the economical functioning of the Court and duplication of judicial time. *General Radio Company* v. *Superior Electric Company*, 293 F. Sec. 949 (Ct. of Appeals, 1st Cir. 1951); *Mottolese* v. *Kaufman*, 176 F. Sec. 301 (2d Cir. 1949); and the determination by the Federal Courts that where the basic question involves domestic relations, determination thereof is best left to the State Court, *Barbour* v. *Barbour*, 62 U. S. 582 (1858); *State of Ohio ex rel Popovici* v. *Agler*, 280 U. S. 379.

CONCLUSION

For the reasons above expressed the application for Writ of Certiorari to review the Judgment below should be denied.

Respectfully submitted,

J. Mortimer Rubenstein
Counsel for Respondent.

Dated: April 10th, 1968.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

Nos. 1185 and 1186

GUSSIE JOFFE,

Petitioner,

v.

SIDNEY H. JOFFE,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Pursuant to Rule 24(4), which provides that reply briefs "addressed to arguments first raised in the briefs in opposition may be filed," petitioner files this reply memorandum addressed to certain arguments first raised in the respondent's two briefs in opposition.

No. 1185

In the New Jersey contempt case, No. 1185, the respondent's brief contends (at page 14) that the petitioner is barred from contesting the validity of the New Jersey restraining orders at this contempt juncture since she took no action to contest or appeal from the original restraining orders. Such an argument must fail for two reasons:

(1) As indicated in the chronology of the New Jersey proceedings set forth in the Petition in No. 1185, the petitioner wife repeatedly protested that the New Jersey restraints violated the Full Faith and Credit Clause of the United States Constitution.[1] But none of those protests resulted in any ruling on the validity of the restraints, in a form that could be considered final and appealable, until Judge Concilio's opinion and order of August 24, 1964. See Petition, Appendix B. There, for the first time, petitioner's objections to the restraints were overruled and the Full Faith and Credit Clause was held not to bar the issuance of the New Jersey restraints.

But even that ruling lacked finality in that the then pending orders to show cause why petitioner should not be held in contempt were referred to other judges for determination. See Pet. App., p. B-24. Not until the contempt orders were entered (Pet. App. pp. C-1 to C-5) did the necessary appealable finality appear. And by that time, the final contempt orders plainly encompassed and incorporated the ruling as to the impact of the Full Faith and Credit Clause rendered by Judge Concilio. Hence the petitioner took every conceivable step to protest the original New Jersey restraints[2] and promptly appealed from the ruling as to their validity as soon as a final and appealable order was entered.

[1] See items numbered (3), (4), (8), (9), and (11) in the New Jersey Superior Court chronology of events. Petition, pp. 11-17.

[2] The respondent persistently submitted the New Jersey restraints to the New York courts, which consistently ignored them as of no legal effect. Petitioner understandably relied upon this attitude of the New York courts to support her position that the New Jersey restraints were invalid under the Full Faith and Credit Clause.

(2) Equally significant is the fact that neither the Supreme Court of New Jersey nor the Appellate Division of the Superior Court declined to pass upon the federal full faith and credit issues because of any asserted failure to appeal from the earlier restraints.[3] Recognizing that the contempt orders were enmeshed with the ruling as to the validity of the restraints, those courts affirmed not only the contempt findings but also ruled that there was "nothing in the record to establish that at the time the Chancery Division action was commenced the New York court had personal jurisdiction over the plaintiff or the marital *res*." Pet. App., p. A-2. In other words, the Full Faith and Credit Clause was held not to bar the New Jersey restraints in this case.

Thus it is in the context of a fully developed and litigated dispute under the Full Faith and Credit Clause that the New Jersey case reaches this Court. Nothing that respondent has said in his opposition brief detracts from the reasons why certiorari should be granted.

No. 1186

The respondent's brief in opposition totally ignores the basic question presented by the Third Circuit's opinion—whether a federal court in an *Erie* situation is independently obligated to determine the degree of faith and credit it will give to a foreign judgment, or whether it must rely upon the faith and credit given by the court of the state in which the federal court sits. The reasons for the grant of certiorari to determine that recurring issue are unaffected by respondent's opposition.

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[3]The respondent did indeed argue the point on the appeal but his contention was pointedly ignored by both appellate courts. And in any event, New Jersey recognizes that injunctive restraints may always be attacked, subsequent to their issuance, on jurisdictional grounds. See *Lawrence v. Lawrence*, 79 N.J. Super. 25 (App. Div.), affirmed, 36 N.J. 549. If the prior New York judgments were entitled to full faith and credit, the New Jersey restraining orders had no jurisdictional basis.

But respondent's brief (page 15) does suggest as a reason for denying certiorari that the federal courts here acted to prevent a multiplicity of suits and a duplication of judicial time. But nothing that the Third Circuit or the District Court did or said justifies any such argument. Moreover, even if the obligation to give full faith and credit to foreign judgments produces different results in different jurisdictions, the resulting multiplicity is not one outlawed by the demands of full faith and credit. Any inconsistencies in results must then be cured through the appellate processes, including those of this Court.

CONCLUSION

For these reasons, supplementing those in the Petitions, the writs of certiorari should issue as requested.

Respectfully submitted,

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